

Kip Evan Steinberg (SBN 096084)
 LAW OFFICE OF KIP EVAN STEINBERG
 Courthouse Square
 1000 Fourth Street, Suite 600
 San Rafael, CA 94901
 Telephone: 415-453-2855
 Facsimile: 415-456-1921
kip@steinberg-immigration-law.com

Attorney for Plaintiff AZIN MORTAZAVI

UNITED STATES DISTRICT COURT
 FOR THE NORTHERN DISTRICT OF CALIFORNIA
 SAN FRANCISCO DIVISION

AZIN MORTAZAVI

Plaintiff,

v.

ROSEMARY MELVILLE, District Director
 USCIS San Francisco District Office
 EMILIO T. GONZALEZ, Director, USCIS
 MICHAEL CHERTOFF, Secretary
 Department of Homeland Security
 MICHAEL MUKASEY, Attorney General,
 Department of Justice
 Defendants

No. C 07-3768 SI

PLAINTIFF'S REPLY

**No Hearing By Stipulation
 and Court Order**

I. THE DELAY IS UNREASONABLE

The consensus view of all the judges in the Northern District of California who have considered the matter is that a processing delay in an adjustment of status case of approximately two years due to an uncompleted FBI name check is unreasonable as a matter of law. *Clayton v. Chertoff*, 2007 WL 2904049 (N.D. Cal.) at *6. Defendants place much emphasis on the fact that the delay in this case is "less than two years", (Defendant's Motion for Summary

Mortazavi v. Melville (No. C 07-3768 SI)
 Plaintiff's Reply

Judgment (“MSJ”) p.2 and Defendants’ Reply (“Reply”) p. 7.) as if there is something magical that transforms a delay from “reasonable” to “unreasonable” at the stroke of midnight on 730th day of delay. There is no such precise boundary. However, in emphasizing this point, Defendants implicitly acknowledge that a delay that actually reaches the two year mark is presumptively unreasonable. As of December 14, 2007, the period of delay in this case is just three weeks shy of two years. This is “approximately two years” and has thus reached the point where it can be considered unreasonable as a matter of law.¹

Defendants state that “Plaintiff’s name check *evidently* requires more intensive review...In essence, comparing her case to those processed within “normal” processing times equates to comparing apples with oranges. Plaintiff’s case is simply not ordinary.” Reply at 8. (emphasis added) However, Defendants offer a mere assertion instead of evidence. They do not offer any facts or even a scintilla of evidence that there is anything in Plaintiff’s background that requires more intensive review. Nor do Defendants offer any evidence as to when USCIS requested the FBI name check. Rather, it is simply “evident” to Defendants that this long delay must be “reasonable” because the process is taking a long time. This is circular logic. This lack of evidence strongly supports a conclusion that the delay is unreasonable as a matter of law. *Wang Yi Chao v. Gonzales*, 2007 WL 3022548 (N.D. Cal.) at *6 (“The government has made no showing of any special circumstances or

¹USCIS actually has a financial disincentive to process Plaintiff’s case in a timely manner. This is because while her case remains pending, USCIS collects substantial filing fees every year that she must reapply for employment authorization and advance parole in order to travel abroad.

1 justifications relating to this Plaintiff specifically that would rebut the
2 presumption that such a delay is unreasonable. Accordingly, the delay is
3 unreasonable.”)

4 5 **II. THE LEGAL DUTY OF THE ATTORNEY GENERAL**

6 The Attorney General is properly named as a defendant because he has a
7 legal duty to acquire, collect, classify, and preserve identification, criminal
8 history information, and other records and exchange such records and
9 information with authorized officials of the Department of Homeland Security.

10 11 **A. 28 U.S.C. §534(a)**

12 This Court has jurisdiction to compel the Attorney General’s legal duty
13 under 28 U.S.C. §534(a) to provide the name check through the FBI, or in the
14 language of the statute, “exchange such records and information” within a
15 reasonable time.

16 Defendants’ argument rests on the assumption that name checks
17 involve only a review of the FBI’s investigative files and do not involve a review
18 of any criminal history information. Reply at 2. However, Defendants have
19 offered no evidence to support these assertions. Ironically, Defendants have
20 previously offered evidence which appears to contradict this position. See Fact
21 Sheet “Immigration Security Checks - How and Why the Process Works” p.2
22 attached to Defendants’ Motion for Summary Judgment as Ex. 1. “The records
23 maintained in the FBI name check process consist of administrative, applicant,
24 **criminal**, personnel **and other files** compiled by law enforcement.”(emphasis

added)² Furthermore, according to the “FBI File Fact Sheet” provided by the FBI to Plaintiff (Appendix Four p.15 attached to Plaintiff’s Cross Motion For Summary Judgment) “The National Name Check Program (NNCP) conducts a search of the FBI’s Universal Index to identify **any** information contained in FBI records that may be associated with an individual and provides the results of that search to the requesting Federal, State or local agency.” (emphasis in original).

Under 28 U.S.C. §534(a) the Attorney General has the legal duty to 1) acquire, collect, classify, and preserve **identification, criminal identification, crime, and other records**; and 2) exchange such **records and information** with, and for the official use of, authorized officials of the Federal Government...” such as USCIS. (emphasis added). Assuming *arguendo* that name checks only covered investigative files, as alleged by Defendants, these investigative files would be covered by the “identification” and “other records” language in 28 U.S.C. §534(a). In any case, it is clear from Defendants’ “Fact Sheet” that name checks do cover criminal records and therefore fit squarely within the purview of 28 U.S.C. §534(a) even if one adopts Defendants’ restricted view of the statute.

B. 8 U.S.C. §1105(b)

This Court has jurisdiction to compel the Attorney General’s legal duty under 8 U.S.C. §1105(b) to provide the name check through the FBI, or in the language of the statute, “provide the... (Immigration) Service access to the criminal history record information contained in the National Crime

²See also, Declaration of Ronald Nelson, attached to Defendants’ MSJ at ¶4 (same).

1 Information Center's Interstate Identification Index and to any other files
2 maintained by the National Crime Information Center that may be mutually
3 agreed upon by the Attorney General and the (Department of Homeland
4 Security) for the purpose of determining whether or not a visa or applicant for
5 admission has a criminal history record indexed in any such file" within a
6 reasonable time.

7 As discussed in the previous section, the USCIS Fact Sheet confirms that
8 the FBI name check process includes a review of criminal records in the FBI
9 databases. That being the case, 8 U.S.C. §1105(b) provides an additional
10 source of a legal duty of the Attorney General to provide this information to
11 USCIS within a reasonable period of time, as required by the Administrative
12 Procedure Act. See, *Singh v. Still*, 470 F. Supp.2d 1064, 1068 (N.D. Cal. 2007)

13 14 **III. COURT DECISIONS**

15 The Attorney General has been found to be a proper defendant in
16 adjustment of status mandamus cases. *Singh*, 470 F. Supp.2d at 1068.
17 Plaintiff recognizes that some other courts have concluded that the Attorney
18 General is not a proper defendant in adjustment of status mandamus cases.
19 However, Plaintiff submits this discussion is dicta in the cases cited by
20 Defendants. Plaintiff is unaware of any case which has decided this question
21 on the legal merits.³

22
23 ³Plaintiff has named the Attorney General as a Defendant for two
24 reasons: 1) It may make the Defendants' communication with the FBI about
25 the status of a name check or possibly expediting a name check easier. In
26 other words, having the Attorney General as a Defendant may have the effect of
27 making the FBI more responsive; 2) If the Attorney General is a Defendant, this
Court can directly order the Attorney General to expedite the name check.

IV. THE LEGAL DUTY OF USCIS

No statute requires USCIS to incorporate the FBI name check into its adjudication of applications for adjustment of status.⁴ However, since USCIS has adopted a policy making an FBI name check a mandatory part of that adjudication process, and USCIS owes a legal duty to process Plaintiff's application for adjustment of status within a reasonable time, USCIS cannot avoid its legal duty by claiming it is powerless to act due to the FBI's delay in providing a name check. Under the APA, "[t]he critical issue is not whether a particular branch of the federal government is responsible for the delay; it is whether the individual petitioner versus the government *qua* government is responsible." *Singh*, 470 F. Supp.2d at 1068 (rejecting argument that USCIS "cannot be blamed for slowness of the name check because it is the responsibility of the FBI").

V. CONCLUSION

For the foregoing reasons, Plaintiff respectfully asks the Court to deny Defendants' motion and grant Plaintiff's motion for summary judgment.

Dated: December 14, 2007

Respectfully submitted,

_____/s/____

Kip Evan Steinberg
Attorney for Plaintiff MORTAZAVI

⁴See *Exhibit A: CIS Ombudsman Annual Report 2007* for a critical review of the USCIS name check policy, particularly the section entitled "Impact of Long Pending FBI Name Checks on USCIS Customers" at page 39.